A

BADAN PEGUAM MALAYSIA

v.

KERAJAAN MALAYSIA

B

FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD CJ
NIK HASHIM FCJ
HASHIM YUSOFF FCJ
AZMEL MAAMOR FCJ
C ZULKEFLI MAKINUDIN FCJ
[CIVIL REFERENCE NO: 06-1-2007 (W)]
27 DECEMBER 2007

D ***CONSTITUTIONAL LAW:*** *Judges - Appointment - Whether appointment of Judicial Commissioner contravened art. 122AB read together with art. 123 Federal Constitution - Whether said appointment null and void - Whether words "advocates of those courts" in art. 123 require an advocate to have been in practice for period of ten years preceding appointment - Federal Constitution, arts. 122AB, 123 -*
E *Interpretation Acts 1948 and 1967, ss. 3, 66 - Legal Profession Act 1976, ss. 3, 30(1)*

STATUTORY INTERPRETATION: *Constitution - Principles of interpretation - Appointment of Judicial Commissioner - Whether*
F *contravened art. 122AB read together with art. 123 Federal Constitution - Whether words "advocates of those courts" in art. 123 require an advocate to have been in practice for period of ten years preceding appointment - Federal Constitution, arts. 122AB, 123 - Interpretation Acts 1948 and 1967, ss. 3, 66 - Legal Profession Act 1976, ss. 3, 30(1)*

G ***CONSTITUTIONAL LAW:*** *Constitution - Interpretation - Appointment of Judicial Commissioner - Whether contravened art. 122AB read together with art. 123 Federal Constitution - Whether words "advocates of those courts" in art. 123 require an advocate to have been in practice for period of ten years preceding appointment - Federal*
H *Constitution, arts. 122AB, 123 - Interpretation Acts 1948 and 1967, ss. 3, 66 - Legal Profession Act 1976, ss. 3, 30(1)*

WORDS & PHRASES: *"advocates of those courts" - Federal Constitution, art. 123 - Interpretation - Whether requires an advocate to*
I *have been in practice for period of ten years preceding appointment as Judicial Commissioner*

The Bar Council ('plaintiff') had filed an originating summons praying for a declaration that the appointment of one Dr Badariah Sahamid ('Dr Badariah') as a Judicial Commissioner ('JC') of the High Court of Malaya was null and void and of no effect, on the ground that the said appointment was in contravention of art. 122AB read together with art. 123 of the Federal Constitution ('Constitution'). The Government of Malaysia ('defendant') subsequently filed a summons in chambers for questions of law relating to the appointment to be referred to this court pursuant to s. 84 of the Courts of Judicature Act 1964. The learned judge allowed the defendant's application and the following constitutional issues were referred to this court for determination: (i) whether the words "advocates of those courts" appearing in art. 123 of the Constitution require an advocate to have been in practice for period of ten years preceding his/her appointment as a JC under art. 122AB of the Constitution; (ii) if the answer to Question (i) is in the negative, whether the appointment of Dr Badariah as a JC of the High Court of Malaya with effect from 1 March 2007 is valid; and (iii) if the answer to Question (i) is in the affirmative, whether the appointment of Dr Badariah as a JC of the High Court of Malaya with effect from 1 March 2007 is null and void.

Held (dismissing the plaintiff's claim)
Per Abdul Hamid Mohamad CJ and Zulkefli Makinudin FCJ (dissenting):

(1) Even though the Constitution does not provide that to qualify to be appointed as a judge or a JC, an advocate must be a practising advocate having a practising certificate, considering the two categories *ie*, "an advocate" and "a member of the legal and judicial service" together, the more reasonable interpretation that should be given to the word "advocate" is a practising advocate. This is further strengthened by the requirement that an advocate or a member of the judicial and legal service must have been so for ten years. That requirement can only mean to enable the advocate or the officer to gain experience at the Bar or in the service before he is appointed. Otherwise, that requirement serves no purpose whatsoever. Unlike in Singapore where a person who has been a "qualified person" for an aggregate period of not less than ten years is qualified to be appointed a judge, in Malaysia he must have been "an advocate of those courts" for ten years preceding the appointment. The difference is clear.

A In Singapore, one does not have to be an advocate at all to qualify to be appointed a judge. He only has to pass the final examination for the degree of Bachelor of Laws from the universities mentioned. So, in Singapore, the requirement to practise does not arise. Unlike in Singapore too, the
B Constitution makes no reference to the Legal Profession Act 1976 ('LPA') or any other relevant law. So, the meaning to be assigned to the word "advocate" is not confined to the meaning of the same word used in the LPA. In any event, the definition of "advocate and solicitor" in the LPA is not of any
C assistance. Other provisions in the LPA are not of much assistance either, except that without a practising certificate, a person cannot practise as an advocate and solicitor. If he cannot practise, then, it is meaningless to apply the ten-year requirement to him. It does not serve any purpose. (para 44)

D **(2)** The definition of the word "advocate" in s. 3 of the Interpretation Acts 1948 and 1967 ('IA') also supports the conclusion that the word must mean an advocate having a practising certificate, otherwise he is not "entitled to practise".
E The requirement that a person must be an advocate for at least ten years is meant to cover advocates and solicitors who practise law. It is not meant to include people who are "only in name" advocates and solicitors merely by virtue of being admitted to the bar but spend their lives doing something else,
F whether teaching law, in business or politics. If they are intended to be included, the Constitution would and should have said so, as in Singapore or, more clearly in India, which provides that a "distinguished jurist" is also qualified to be appointed a judge. (paras 45 & 46)

G **(3)** Furthermore, this court had only last year, in the case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* ('*Rajasegaran*'s case'), interpreted the provision of s. 23A(1) of the Industrial Relations Act 1967 ('IRA') to mean a practising advocate and
H solicitor even though that section specifically refers to the meaning of "advocate and solicitor" in the LPA, which only speaks of an advocate and solicitor who has been admitted and enrolled as such. The definition of the word "advocate" in art. 123 of the Constitution is not restricted to the
I meaning given in the LPA. The reasoning in *Rajasegaran*'s case applies with equal, if not greater, force to the present case. If a narrow construction is adopted to interpret art. 123 of the

Constitution in that an advocate need not be in active practice to be eligible for appointment as a judge or as a JC, and applying the principles enunciated in *Rajasegaran*'s case, it would lead to an absurd consequence in that a person who is ineligible to be appointed as chairman of the Industrial Court (an inferior court) could be appointed as a judge or as a JC of the High Court. (paras 47 & 138)

(4) It may be that the time has come for other categories of persons eg, academicians to be included as persons qualified to be appointed as judges especially in such areas of law as intellectual property, conventional and Islamic finance and banking and so on. But that is a matter of policy for the government to decide. It is not right for the court to rewrite the Constitution under the pretext of interpreting it to sneak in someone under the two existing categories when he or she does not really belong to either of them. This judgment is not about the suitability of Dr Badariah to be appointed a JC. Academically, she is definitely one of the most "qualified" persons to be appointed a JC. This judgment is about who is qualified to be appointed a JC or a judge under the existing law, in particular, what is meant by "an advocate" in art. 123 of the Constitution. (paras 48 & 49)

(5) For the reasons given above, Dr Badariah, not having practised law at all since her admission to the Bar, did not qualify to be appointed a JC. Therefore, the answers to Questions (i) and (iii) are in the affirmative. In view of this, the answer to Question (ii) becomes irrelevant. (paras 50 & 51)

Per Nik Hashim, Hashim Yusoff and Azmel Maamor FCJJ delivering the majority judgment of the court:

(1) A broad and liberal interpretation should be given to the phrase "advocate of those courts" under art. 123 of the Constitution. This call is in accord with the well-established principle that a Constitution should be construed with less rigidity and more generosity than other statutes. Therefore, the interpretation as requiring only an advocate and solicitor who has been in practice (in possession of a practising certificate) preceding the appointment before he could be qualified as a JC or a judge of the High Court, would amount to reading words which are not in art. 123 of the Constitution. Surely,

this is a wrong thing to do for the term "advocate" in the Constitution appears to have the same meaning as "advocate" and "advocate and solicitor" under s. 66 of the IA to mean an advocate and solicitor of the High Court, and under s. 3 of the LPA the phrase "advocate and solicitor" means an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act. So, in the present case, although Dr Badariah has no practising certificate under the LPA, she is an advocate and solicitor as she had been admitted and enrolled as one, and there is nothing in s. 3 of the LPA to say that to be an advocate and solicitor one must have a practising certificate. Thus, an "advocate of those courts" under art. 123 of the Constitution does not necessarily need to be a practising advocate and solicitor. (paras 57 & 59)

(2) If Parliament had intended that only legally qualified appointees who had actually practised for ten years to qualify for appointment as a High Court judge or JC, the draftsman would have used the words "a practising advocate" or "legal practitioner" instead of the word "advocate" in art. 123 of the Constitution. Interpreting art. 123 of the Constitution broadly and not in a pedantic way would produce the same result reached in *M. Samantha Murthi v. The Attorney-General & Ors* as to the meaning of the word "advocate", where the Federal Court held that as long as a person has been "admitted and enrolled" under the LPA or under any previous written law then he is an advocate and solicitor within the said Act. *Rajasegaran*'s case is distinguishable on the ground that in that case the Federal Court considered and interpreted the words "advocate and solicitor" in the context of the IRA, an ordinary legislation, according to ordinary rules of statutory interpretation. (paras 106 & 107)

(3) The case of Dr Visu Sinnadurai can be regarded as a precedent as to how the previous appointing authorities construed art. 123 of the Constitution concerning qualification for the appointment of candidates to be judges or JCs. He was straightaway appointed as a High Court judge while serving as the Commissioner for Law Revision for a few years (less than ten years) immediately preceding his appointment. Prior to his appointment as the Commissioner for Law Revision, he was gainfully employed as a Law Professor at the Law Faculty,

University of Malaya. It would have been legally impossible for him to be issued with a practising certificate because he was all the time gainfully employed, which was a restriction to obtaining a practising certificate as provided under s. 30(1) of the LPA. However, there was no such objection by anybody including the Bar Council then. As such, Dr Badariah's appointment should be viewed similarly as that of Dr Visu Sinnadurai. But in the case of Dr Badariah, the Bar Council objected. Why is it condoned in one case and objected to in another? Why is there inequality of treatment in respect of these two persons? In the light of the precedent created through the appointment of Dr Visu Sinnadurai and lack of objection by the Bar Council, it would be highly unfair and certainly most unconscionable on the part of the Bar Council to practise double standards. Such differing treatment by the Bar Council should not be condoned by this court at all. (paras 121, 122, 123 & 124)

(4) For these reasons, Dr Badariah was qualified to be appointed as a JC as she had been an advocate of the High Court of Malaya for ten years preceding her appointment within the meaning of art. 123 of the Constitution. Therefore, Question (i) would be answered in the negative and it follows that the answer to Question (ii) would be in the affirmative. That being so, Question (iii) falls by itself. (para 108)

Bahasa Malaysia *Translation Of Headnotes*

Majlis Peguam ('plaintif') telah memfail satu saman pemula memohon deklarasi bahawa perlantikan seorang Dr Badariah Sahamid ('Dr Badariah') sebagai seorang Pesuruhjaya Kehakiman Mahkamah Tinggi Malaya ('JC') adalah batal dan tidak berkesan, atas alasan bahawa perlantikan tersebut melanggar fasal 122AB Perlembagaan Persekutuan ('Perlembagaan') di baca bersekali dengan fasal 123 di situ. Berikutnya, Kerajaan Malaysia ('defendan') telah memfail saman dalam kamar bagi merujuk persoalan undang-undang berkaitan dengan perlantikan tersebut ke mahkamah ini di bawah s. 84 Akta Mahkamah Kehakiman 1964. Yang arif hakim membenarkan permohonan defendan dan isu-isu perlembagaan berikut telah dirujuk ke mahkamah ini untuk penentuan, iaitu: (i) sama ada perkataan-perkataan "peguambela mahkamah-mahkamah tersebut" di dalam fasal 123 Perlembagaan mengkehendaki seseorang peguambela perlu beramal selama

A sepuluh tahun sebelum ia boleh dilantik sebagai seorang JC di bawah fasal 122AB Perlembagaan; (ii) jika jawapan kepada Soalan (i) berbentuk negatif, sama ada perlantikan Dr Badariah sebagai seorang JC Mahkamah Tinggi Malaya berkuatkuasa dari 1 Mac 2007 sah; dan (iii) jika jawapan kepada Soalan (i) afirmatif, sama
B ada perlantikan Dr Badariah sebagai JC Mahkamah Tinggi Malaya berkuatkuasa dari 1 Mac 2007 adalah tak sah dan batal.

Diputuskan (menolak tuntutan plaintif)
Oleh Abdul Hamid Mohamad KHN dan Zulkefli Makinudin
C **HMP (menentang):**

(1) Walaupun Perlembagaan tidak memperuntukkan bahawa bagi melayakkan diri untuk dilantik sebagai seorang hakim atau JC, seseorang peguambela hendaklah seorang peguambela yang
D beramal dan memiliki sijil amalan, mengambilkira kedua-dua kategori "seorang peguambela' dan "seorang pegawai perkhidmatan kehakiman dan perundangan' secara bersekali, tafsiran yang lebih munasabah yang harus diberi kepada perkataan "peguambela" adalah seorang peguambela yang
E beramal. Ini diperkukuhkan dengan kehendak bahawa seorang peguambela atau seorang pegawai perkhidmatan kehakiman dan perundangan hendaklah berada dalam kedudukannya itu selama sepuluh tahun. Kehendak ini adalah semata-mata bagi membolehkan peguambela atau pegawai berkenaan mendapat
F pengalaman yang secukupnya di Bar atau dalam perkhidmatan sebelum beliau dilantik. Jika dikatakan sebaliknya, maka keperluan ini akan menjadi sia-sia sahaja. Tidak seperti di Singapura, di mana seseorang yang menjadi 'seorang yang layak' untuk tempoh agreget tidak kurang dari sepuluh tahun
G adalah layak untuk dilantik sebagai seorang hakim, di Malaysia beliau mestilah telah menjadi "seorang peguambela mahkamah-mahkamah tersebut' selama sepuluh tahun sebelum dilantik. Perbezaannya jelas. Di Singapura, seseorang langsung tidak perlu menjadi seorang peguambela untuk layak dilantik sebagai
H seorang hakim. Beliau hanya perlu lulus peperiksaan akhir ijazah Sarjana Muda Undang-Undang dari universiti-universti yang disebutkan. Jadi, di Singapura, keperluan beramal adalah tidak berbangkit. Juga, tidak seperti di Singapura, Perlembagaan tidak membuat sebarang rujukan kepada Akta Profesion
I Undang-Undang 1967 ('LPA') atau mana-mana undang-undang lain yang relevan. Jadi, maksud yang harus diberi kepada perkataan "peguambela" tidak boleh terhad kepada

maksud perkataan sama yang digunakan di dalam LPA. Walaupun begitu, tafsiran "peguambela dan peguamcara" di dalam LPA tidak membantu langsung. Lain-lain peruntukan di dalam LPA juga tidak membantu sangat, kecuali bahawa tanpa sijil amalan seseorang tidak boleh beramal sebagai seorang peguambela dan peguamcara. Jika beliau tidak boleh beramal, maka adalah sia-sia untuk menggunapakai keperluan 10 tahun kepadanya. Ia tidak memberi apa-apa guna.

(2) Definasi perkataan "peguambela" di dalam s. 3 Akta-Akta Tafsiran 1948 dan 1967 ('IA') juga menyokong konklusi bahawa perkataan tersebut mestilah bermaksud seorang peguambela yang mempunyai sijil amalan, jika tidak ia tidak "berhak untuk beramal". Keperluan bahawa seseorang mesti menjadi seorang peguambela untuk tempoh sepuluh tahun adalah dimaksudkan kepada peguambela dan peguamcara yang beramal. Ia tidak bermaksud untuk merangkumi orang-orang yang menjadi peguambela dan peguamcara "atas nama sahaja" disebabkan mereka telah diterima-masuk ke badan peguam tetapi menghabiskan hidup mereka dengan membuat sesuatu yang lain, sama ada mengajar undang-undang, berniaga atau berpolitik. Jika mereka ini dihasrat untuk dirangkumi, maka Perlembagaan tentunya akan menyatakan demikian, seperti yang berlaku di Singapura, ataupun lebih jelas lagi di India, yang memperuntukkan bahawa seorang "distinguished jurist" adalah juga layak untuk dilantik sebagai hakim.

(3) Lagipun, baru setahun yang lalu mahkamah ini di dalam kes *All Malayan Estates Staff Union v. Rajasegaran & Ors* ('kes *Rajasegaran*') telah mentafsirkan peruntukan s. 23A(1) Akta Perhubungan Perusahaan 1967 ('IRA') sebagai bermaksud seorang peguambela dan peguamcara yang beramal, walaupun seksyen tersebut secara khusus merujuk kepada maksud "peguambela dan peguamcara" di dalam LPA, yang hanya bercakap mengenai seorang peguambela dan peguamcara yang telah diterima-masuk dan disenaraikan sebegitu. Definasi perkataan "peguambela" di dalam fasal 123 Perlembagaan tidak terhad kepada maksud yang diberi di dalam LPA. Taakulan di dalam kes *Rajasegaran* terpakai dengan kekuatan yang sama, jikapun tidak lebih lagi, kepada kes semasa. Jika tafsiran yang sempit dipakai bagi mentafsir fasal 123 Perlembagaan dalam ertikata seorang peguambela tidak perlu menjadi pengamal yang aktif untuk layak dilantik sebagai seorang JC, dan

menggunapakai prinsip yang diutarakan di dalam kes *Rajasegaran*, ia akan menjurus kepada akibat yang absurd kerana seorang yang tidak layak untuk dilantik sebagai pengerusi Mahkamah Perusahaan (sebuah mahkamah inferior) masih boleh dilantik sebagai seorang hakim atau JC Mahkamah Tinggi.

(4) Mungkin sudah sampai masanya bagi kategori orang yang dikira layak dilantik sebagai hakim diperluaskan bagi merangkumi para ahli akademik terutama untuk bidang-bidang seperti undang-undang harta intelektual, perbankan dan kewangan Islam dan konvensional dan lain-lain. Namun, itu adalah satu perkara polisi yang harus ditentukan oleh kerajaan. Adalah salah untuk mahkamah menulis semula Perlembagaan di bawah pretext mentafsirkannya bagi tujuan menyeludup seseorang ke dalam dua kategori sedia ada sedangkan beliau sebenarnya tidak berada dalam mana-mana kategori tersebut. Penghakiman ini tidak berkaitan dengan kesesuaian Dr Badariah dilantik sebagai seorang JC. Dari segi akademik, beliau tentunya antara orang yang paling "layak" dilantik sebagai JC. Penghakiman ini adalah mengenai siapa yang layak dilantik sebagai seorang JC atau seorang hakim di bawah undang-undang sedia ada, terutama apa yang dimaksudkan dengan "seorang peguambela" di dalam fasal 123 Perlembagaan.

(5) Atas alasan-alasan yang diberi, Dr Badariah, kerana tidak pernah beramal sebagai peguam sejak mula diterima-masuk ke Badan Peguam, adalah tidak layak untuk dilantik sebagai seorang JC. Oleh itu, jawapan kepada Soalan (i) dan (iii) adalah afirmatif. Dengan itu, jawapan kepada Soalan (ii) adalah tidak relevan.

Oleh Nik Hashim, Hashim Yusoff dan Azmel Maamor HHMP menyampaikan penghakiman majoriti mahkamah:

(1) Satu tafsiran yang luas dan liberal perlu diberi kepada ungkapan "peguambela mahkamah-mahkamah tersebut" di bawah fasal 123 Perlembagaan. Ini adalah selaras dengan prinsip mantap bahawa suatu Perlembagaan harus ditafsir dengan secara yang tidak ketat dan kendur berbanding statut-statut lain. Oleh itu, pentafsiran yang hanya mengkehendaki seorang peguambela dan peguamcara yang beramal (mempunyai sijil amalan) sebelum perlantikan bagi melayakkannya dilantik

sebagai JC atau hakim Mahkamah Tinggi, sebenarnya adalah menokok tambah perkataan yang tidak ada di dalam fasal 123 Perlembagaan. Tentunya ini sesuatu yang salah untuk dilakukan kerana terma "peguambela" di dalam Perlembagaan menyerlahkan maksud yang sama seperti "peguambela" dan "peguambela dan peguamcara" di dalam s. 66 IA, iaitu seorang peguambela dan peguamcara Mahkamah Tinggi, sementara di bawah s. 3 LPA perkataan "peguambela dan peguamcara" bermaksud seorang peguambela dan peguamcara Mahkamah Tinggi dan yang disenaraikan di bawah Akta itu atau di bawah mana-mana undang-undang bertulis sebelum Akta tersebut berkuatkuasa. Jadi, dalam kes semasa, walaupun Dr Badariah tidak mempunyai sijil amalan di bawah LPA, beliau adalah seorang peguambela dan peguamcara dan diterimamasuk dan disenarai sedemikian, dan tiada apa-apa pun di dalam s. 3 LPA yang menyatakan bahawa untuk menjadi seorang peguambela dan peguamcara seseorang itu hendaklah memiliki sekeping sijil amalan. Maka itu, seorang "peguambela mahkamah-mahkamah tersebut" di bawah fasal 123 Perlembagaan tidak semestinya seorang peguambela dan peguamcara yang beramal.

(2) Jika Parlimen berniat bahawa hanya orang yang layak dalam undang-undang yang beramal selama sepuluh tahun sahaja yang boleh dilantik sebagai seorang hakim atau JC Mahkamah Tinggi, maka penggubal-penggubal tentunya akan menggunakan ungkapan 'seorang peguambela yang beramal" atau "pengamal undang-undang" dan tidak perkataan "peguambela" di dalam fasal 123 Perlembagaan. Mentafsir dengan luas fasal 123 Perlembagaan dan tidak secara pedantic akan membuahkan hasil yang sama seperti yang dirumus di dalam *M. Samantha Murthi v. The Attorney-General & Ors* berkaitan maksud perkataan "peguambela", di mana Mahkamah Persekutuan memutuskan bahawa selagi mana seseorang itu "diterima-masuk dan disenaraikan" di bawah LPA atau di bawah mana-mana undang-undang bertulis terdahulu maka ia adalah seorang peguambela dan peguamcara menurut maksud Akta tersebut. Kes *Rajasegaran* boleh dibezakan atas alasan bahawa dalam kes tersebut Mahkamah Persekutuan telah menimbang dan mentafsir perkataan-perkataan "peguambela dan peguamcara" di dalam konteks IRA, suatu undang-undang biasa, menurut kaedah-kaedah biasa pentafsiran statut.

(3) Kes *Dr Visu Sinnadurai* boleh dianggap sebagai duluan tentang bagaimana pihakberkuasa pelantik dahulu mentafsir fasal 123 Perlembagaan berkaitan kelayakan calon-calon hakim atau JC. Beliau terus dilantik sebagai hakim Mahkamah Tinggi ketika masih berkhidmat sebagai Pesuruhjaya Semakan Undang-Undang untuk beberapa tahun (kurang dari sepuluh tahun) sebelum perlantikan. Sebelum perlantikannya sebagai Pesuruhjaya Semakan Undang-Undang, beliau telah berkhidmat sebagai Profesor Undang-Undang di Fakulti Undang-Undang, Universiti Malaya. Adalah mustahil untuk beliau diberikan sijil amalan oleh kerana beliau pada sepanjang masa masih berkhidmat, di mana itu merupakan satu halangan dalam pemerolehan sijil amalan berdasarkan s. 30(1) LPA. Bagaimanapun, tiada siapa pun yang membantah termasuklah Majlis Peguam pada masa itu. Oleh itu, perlantikan Dr Badariah harus dilihat dari kacamata yang sama. Namun, dalam kes Dr Badariah, Majlis Peguam telah membantah. Kenapa ianya diterima di dalam satu kes tetapi dibantah bagi yang satu lagi? Kenapa kedua-dua orang ini diberikan layanan yang berbeza? Mengambilkira duluan yang tercipta dari perlantikan Dr Visu Sinnadurai serta ketiadaan bantahan dari Majlis Peguam, ianya amat tidak adil dan pastinya tidak berhati budi di pihak Majlis Peguam untuk mengamalkan pilih kasih. Perbezaan layanan sedemikian oleh Majlis Peguam tidak harus dilepas pandang begitu sahaja oleh mahkamah ini.

(4) Atas alasan-alasan ini, Dr Badariah layak untuk dilantik sebagai seorang JC kerana beliau adalah seorang peguambela Mahkamah Tinggi Malaya selama sepuluh tahun sebelum perlantikannya itu seperti yang dimaksudkan oleh fasal 123 Perlembagaan. Oleh itu, Soalan (i) dijawab secara negatif dan ianya mengikut bahawa jawapan kepada Soalan (ii) adalah bersifat afirmatif. Dengan jawapan-jawapan ini, Soalan (iii) gugur dengan sendirinya.

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

Attorney General of the Commonwealth, ex relatione McKinley v. Commonwealth of Australia [1975] 135 CLR 1 ***(refd)***

CP Agarwal v. CD Parikh [1970] SC AIR 1061 ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***
Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 CA ***(refd)***
Dupont Steels Ltd & Ors v. Sirs and Ors [1980] 1 WLR 142 ***(refd)***
Kamariah Ali & Yang Lain lwn. Kerajaan Negeri Kelantan dan Satu Lagi [2004] 3 CLJ 409 FC ***(refd)***
M Samantha Murthi v. The Attorney-General & Ors [1982] CLJ 241; [1982] CLJ (Rep) 213 FC ***(refd)***
Malaysian Bar v. Dato' Kanagalingam Veluppillai [2004] 4 CLJ 194 FC ***(refd)***
Merdeka University Bhd v. Government of Malaysia [1981] CLJ 175; [1981] CLJ (Rep) 191 HC ***(refd)***
Minister of Home Affairs v. Fisher [1980] AC 319 ***(refd)***
Syed Mubarak Syed Ahmad v. Majlis Peguam Malaysia [2000] 3 CLJ 659 CA ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Legislation referred to:
Advocates and Solicitors Ordinance 1948, s. 2
Advocates Ordinance (Sabah Cap 2), s. 9
Courts of Judicature Act 1964, s. 84
Federal Constitution, arts. 8(1), 122AB, 122B, 123(b), 217(2)(b)
Industrial Relations Act 1967, ss. 23(1), 23A(1)
Interpretation Acts 1948 and 1967, ss. 2, 3, 17A, 65, 66
Legal Profession Act 1976, ss. 3, 10, 13(1), 18, 21(1), 28A, 28B, 29(1), 30(1), 35(1), (2), 36(1), 37, 38(g)
Sarawak Advocates Ordinance (Cap 110), s. 9

Constitution of the Republic of Singapore [Sing], art. 96
Indian Constitution, art. 124(3)
Legal Profession Act (Cap 161) [Sing], s. 2

Other source(s) referred to:
Black's Law Dictionary, 6th edn, p 55
Jagadish Swarup, *Legislation and Interpretation,* pp 479-480

For the plaintiff - Robert Lazar (Mark Lau with him); M/s Sivananthan
For the defendant - Tan Sri Abdul Gani Patail A-G's Chambers (Dato' Kamaludin Md Said, Azizah Nawawi & Suzana Atan SSFC with him)

[Appeal from High Court, Kuala Lumpur; Originating Summons No: R2-24-63-2007]

Reported by Suresh Nathan

JUDGMENT

Abdul Hamid Mohamad CJ:

[1] By an originating summons dated 27 July 2007, the Bar Council ("plaintiff") prayed for "a declaration that the appointment of Dr. Badariah bte Sahamid as a Judicial Commissioner of the High Court of Malaya is null and void and of no effect on the ground that the said appointment is in contravention of art. 122AB read together with art. 123 of the Federal Constitution."

[2] On 27 August 2007, ie, one day before the matter was scheduled to be mentioned before the learned judge of the High Court, the Government of Malaysia ("defendant") filed a summons in chambers for questions of law relating to the appointment be referred to this court pursuant to s. 84 of the Courts of Judicature Act 1964. On 18 September 2007, after hearing the parties, the learned judge allowed the defendant's application and referred the constitutional issues to this court for its determination. The issues are as follows:

i. Whether the words "advocates of those courts" appearing in Article 123 of the Federal Constitution requires an Advocate to have been in practice for a period of ten years preceding his/her appointment as a Judicial Commissioner under Article 122AB of the Federal Constitution?

ii. If the answer to Question I is in the negative, is the appointment of Y.A. Dr. Badariah Sahamid as a Judicial Commissioner of the High Court of Malaya with effect from 1 Mac 2007 valid?

iii. If the answer to Question I is in the affirmative, is the appointment of Y.A. Dr. Badariah Sahamid as a Judicial Commissioner of the High Court of Malaya with effect from 1 Mac 2007 null and void?

[3] We heard the arguments on 22 October 2007 and reserved our judgments. This is my judgment.

[4] The facts are not in dispute. Dr. Badariah Sahamid graduated with a first class honours degree in law from the University of Malaya on 17 June 1978. That qualification renders her to be a "qualified person" within the meaning of the Legal Profession Act 1976. In 1979, she was conferred with a Masters in Law by the London School of Economics and Political Science

(LSE), the University of London. Having completed her pupilage and having satisfied the requirements of the Act, on 26 September 1987, she was admitted as an advocate and solicitor of the High Court of Malaya. However, she never applied for nor obtained a practising certificate that would enable her to practise as an advocate and solicitor. Instead, she served as a lecturer at the Faculty of Law of the University of Malaya from 14 January 1980. On 10 April 1992 she became an Associate Professor and on 31 December 2006 a Professor, until her appointment as a Judicial Commissioner of the High Court of Malaya. No doubt she has a very impressive academic credential. However, the issue before this court is one of law, simply put, whether she is, in law, qualified for the said appointment. That calls, in particular, for the interpretation of arts. 122AB, 122B and 123. Article 122AB, in substance, provides that the Yang di-Pertuan Agong may "appoint to be judicial commissioner … any person qualified for appointment as a judge of the High Courts; … ."

[5] Article 122B provides for the appointment of judges of Federal Court, the Court of Appeal and the High Courts.

[6] Regarding the qualification of a person to be appointed as a judge of the High Courts, art. 123 provides:

> 123. A person is qualified for appointment under Article 122B as a judge of the Federal Court, as a judge of the Court of Appeal or as a judge of any of the High Courts if:
>
> (a) he is a citizen; and
>
> (b) for the ten years preceding his appointment he has been an advocate of those courts or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one of sometimes another.

[7] Prior to 16 September 1963 that article read as follows:

> 123. A person is qualified for appointment as a judge of the Supreme Court if:
>
> (a) he is a citizen; and
>
> (b) has been an advocate of the Supreme Court or a member of the judicial and legal service of the Federation for a period of not less than ten years, or has been the one for part and the other for the remainder of that period.

[8] Clearly the changes were made as a result of the formation of Malaysia.

[9] It is art. 123(b), in particular, that calls for interpretation in this case.

[10] First, I would approach it by looking at the provision of the Constitution itself to discover the meaning intended.

[11] Under art. 123(b) there are two categories of persons who are qualified to be appointed as a judge:

(1) a person who has been an advocate and solicitor for ten years preceding his appointment.

(2) A person who has been a member of the legal and judicial service of the Federation or of the legal service of a State or sometimes one and sometimes another or ten years preceding the appointment.

[12] The Constitution specifically mentions "an advocate" and "a member of the legal and judicial service". Compare, for example, with the position in Singapore and India. In Singapore, Article 96 provides:

> 96. A person is qualified for appointment as a Judge of the Supreme Court if he has for an aggregate period of not less than 10 years been a qualified person within the meaning of section 2 of the Legal Profession Act (Cap. 161) or a member of the Singapore Legal Service, or both.

[13] In other words, in Singapore there are three categories of persons who qualify to be appointed as a judge:

(1) A qualified person within the meaning of s. 2 of the Legal Profession Act (Cap. 161).

(2) A member of the Singapore Legal Service.

(3) A person who has been both (1) and (2).

[14] Category (2) in Singapore is similar to category (2) in Malaysia: both refer to a member of the legal and judicial service.

[15] But category (1) in the two countries differ. In Malaysia, the key words are "an advocate". No interpretation is given as to who is "an advocate". There is no reference to the Legal

Profession Act 1976 or its predecessor at the time the Constitution was promulgated. On the other hand, in Singapore, the term used is "qualified person within the meaning of s. 2 of the Legal Profession Act (Cap. 161)." In other words, specific reference is made to the meaning of "qualified person" provided in the Act. So, in Singapore, to know whether a person is qualified to be appointed as a judge, one only has to look at the provision of the Legal Profession Act. Section 2 of the Singapore Legal Profession Act provides:

> "qualified person" means any person who:
>
> (a) before 1st May 1993:
>
> (i) has passed the final examination for the degree of Bachelor of Laws in the University of Malaya in Singapore, the University of Singapore or the National University of Singapore;
>
> (ii) was and still is a barrister-at-law of England or of Northern Ireland or a member of the Faculty of Advocates in Scotland;
>
> (iii) was and still is a solicitor in England or Northern Ireland or a writer to the Signet, law agent or solicitor in Scotland; and
>
> (iv) was and still is in possession of such other degree or qualification as may have been declared by the Minister under section 7 in force immediately before 1st January 1994 and has obtained a certificate from the Board under that section;
>
> (b) on or after 1st May 1993 possesses such qualifications and satisfies such requirements as the Minister may prescribe under subsection (2); or
>
> (c) is approved by the Board as a qualified person under section 7;

[16] So, just to take one example, before 1 May 1993, in Singapore, a person who has passed the final examination for the degree of Bachelor of Laws in one of the universities mentioned is qualified to be appointed as a judge. He does not have to be admitted to the bar or to practice.

[17] In India, art. 124(3) of the Indian Constitution provides:

> (3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and:
>
> (a) has been for at least five years a judge of a High Court or of two or more such Courts in succession; or
>
> (b) has been for at least ten years an advocate of a High Court or of two or more such courts in succession; or
>
> (c) is, in the opinion of the President, a distinguished jurist.

[18] Note that under (c) "a distinguished jurist" is qualified to be appointed a judge.

[19] Coming back to the position in Malaysia, we have noted the two categories: an advocate and a member of the judicial and legal service. No mention is made of any other category, be it a "distinguished jurist", a law graduate *per se*, or a law graduate who may be working as a lecturer, professor, banker, a government servant, a politician or who whatever.

[20] Let us now see if there is something in common between "an advocate" and "a member of the judicial and legal service" from which we can extract the intent of the Constitution. A member of the judicial and legal service can only mean a person who is employed as and works as a member of the judicial and legal service. He does the work, the judicial or legal work. There is no such thing as a "non-working" member of the judicial and legal service. He has to work as a judicial and legal officer for at least ten years before he qualifies to be appointed a judge. That is for him to gain the necessary experience to do the work of a judge when appointed.

[21] In my view, the other limb of art. 123(b), ie, "an advocate" should be seen from the same perspective. An "advocate" must be a person who works as an advocate. He too must have the experience working as an advocate before he qualifies to be appointed a judge. It is only logical that the two limbs must be seen from the same perspective.

[22] The two categories of persons are required to have been so for ten years preceding their appointments. Why is such a requirement provided for? The obvious answer is for them to

obtain experience from the work that they do as an advocate or a member of the judicial and legal service. I cannot think of any other reason for it.

[23] That being so, then, the term "advocate" must necessarily mean a person who works as an advocate or who practices law.

[24] It is interesting to note that art. 123(b) uses the word "advocate" instead of "advocate and solicitor". Section 2 of the Advocates and Solicitors Ordinance 1948, the law in force when the Constitution was drafted and promulgated contained a definition of "advocate and solicitor" and "solicitor" as follows:

> "advocate and solicitor" means an advocate and solicitor admitted and enrolled under this Ordinance, or prior to the commencement of this Ordinance under any written law of the Federated Malay States or of either the Settlements or of the State of Johore.
>
> "Solicitor" means a practitioner when performing those of his professional activities normally performed by a solicitor but not by a member of the Bar in England.

[25] We see that, even though the term "advocate and solicitor" is used in the Ordinance, the drafters of the Constitution chose the word "advocate" when drafting the Constitution. True that the Ordinance did not define the word "advocate" even though the word "solicitor" was defined. Both are terms peculiar to the English legal profession. An advocate conducts cases in court. A solicitor does not.

[26] Bearing in mind the background of the members of the Reid Commission that drafted the Constitution, it could well be that they were influenced by the position in England where, until very recently, only advocates were appointed as judges, not solicitors, even though in the then Malaya and until now we have a joint profession.

[27] Besides, at the time when the Constitution was drafted, there was not even a law school in the then Malaya, or even when Malaysia was formed, not to speak of professors of law. There were certainly some people with a law degree in the civil service or in the private sector. But, the drafters of the Constitution only chose those advocates or members of the legal and judicial service as persons qualified to be appointed judges. They were the "practising lawyers".

[28] Lest I am misunderstood, I am not saying that the Constitution should be interpreted under the circumstance or in accordance with the law at the time it was drafted. If the Malaysian Constitution contains a provision similar to the Singapore Constitution ie, "a qualified person within the meaning of s. 2 of the Legal Profession Act (Cap. 161)", then whatever the meaning that is given to that term at any particular point of time the Constitution is to be interpreted, should be the meaning prevailing that should adopted. But, no definition of the term "advocate" is given in the Constitution, no provision is made that reference should be made to a provision in another law. By looking at the provision of the Constitution itself, in my view, the more reasonable meaning that should be given to the word "advocate" is a practising advocate.

[29] I shall now consider other laws where the term "advocate" is used in order to see if they are of assistance. Even in so doing, the meaning given in those laws need not necessarily be the meaning assigned to the word by the Constitution. That is because, words must be read in their contexts. As has been mentioned earlier under s. 2 of the Ordinance, "advocate and solicitor" was defined as "an advocate and solicitor admitted and enrolled under this Ordinance …". Even that definition is subject to the words "unless there is something repugnant in the subject or context." So, it is quite neutral.

[30] Under Part I of the Interpretation Acts 1948 and 1967, in s. 3, "advocate" is defined as follows:

> "advocate" means a person **entitled to practise** as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia; (emphasis added).

[31] Who is "entitled to practise as an advocate and solicitor under the law in force in any part of Malaysia"? Under the Legal Profession Act 1976, "no person shall practise as an advocate and solicitor or do any act as an advocate and solicitor unless his name is on the Roll and he has a valid practising certificate authorizing him to do the act" – s. 36(1). So, he must have a practising certificate before he can practise as an advocate and solicitor. Otherwise, he is an "unauthorized person" – s. 36(1). He commits an offence if he acts as an advocate and solicitor – s. 37. So, if we go by the Legal Profession Act 1967 "a person entitled to practise" must necessarily mean a person whose name is on the Roll and has a valid practising certificate.

[32] Under the Sarawak Advocates Ordinance (Cap. 110) only an advocate who has "a certificate to practise" is "entitled to practise in Sarawak" for a particular year – s. 9. The position is the same in Sabah – see s. 9 of the Advocates Ordinance (Sabah Cap. 2).

[33] Section 30(1) of the Legal Profession Act 1976, *inter alia*, provides:

> 30.(1) No advocate and solicitor shall apply for a practising certificate:
>
> (a) …
>
> (b) …
>
> (c) If he is gainfully employed by another person, firm or body in a capacity other than as an advocate and solicitor.

[34] This provision has been interpreted by the Court of Appeal in *Syed Mubarak Syed Ahmad v. Majlis Peguam Malaysia (sic)* [2000] 3 CLJ 659. The court held that the words "gainfully employed" include a person who practises as an accountant in his own accountancy firm and not only a person "employed by another person, firm or body." As a result he was not qualified to apply for a practising certificate.

[35] In the present case, had Dr. Badariah wanted to apply for a practising certificate, she would not even be able to raise a similar argument as in *Syed Mubarak Syed Ahmad (supra)* as she was employed by the university. In other words, she would not qualify to obtain a practising certificate even if she wanted to practise during the period she was employed by the university.

[36] We shall now look at the judgment of this court in *All Malayan Estates Staff Union v. Rajasegaran & Ors.* [2006] 4 CLJ 195. In that case, the respondent was admitted and enrolled as an advocate and solicitor of the High Court on 15 December 1995. He commenced legal practise on 1 April 1996 and ceased to do so on 23 January 2001. He was appointed as a Chairman of the Industrial Court on 15 January 2004. So, even though he had been admitted and enrolled as an advocate and solicitor for eight years and one month at the date of his appointment, he was in practise for only four years nine months and 22 days at that time. Section 23A(1) of the Industrial Relations Act 1967 provides:

A 23A(1). A person is qualified for appointment as President under section 21(1)(a) and as Chairman under section 23(2) if, for the seven years preceding his appointment, he has been an advocate and solicitor within the meaning of the Legal Profession Act 1976 or a member of the judicial and legal service of the Federation or
B of the legal service of a State, or sometimes one and sometimes another.

[37] The question was whether he was qualified to be appointed as a Chairman of the Industrial Court.

C **[38]** This court held that the appointment of the respondent was invalid. Augustine Paul, FCJ, delivering the judgment of this court, *inter alia,* said at p. 214 of the report:

Thus, the purpose of the seven-year period in relation to a member of the judicial and legal service can be used to determine
D the purpose of the same period in the case of an advocate and solicitor. There can be no dispute that the reference to a member of the judicial and legal service is a reference to a person who has been employed as a legal officer. The seven-year period in relation to such an officer is therefore a reference to his working
E experience in that capacity for the prescribed number of years. Similarly, the need for a person to have been an advocate and solicitor for seven years preceding his appointment is obviously a reference to his practice or experience as such. The rationale underlying the equation of the seven year requirement for an advocate and solicitor with a member of the judicial and legal
F service would promote and not frustrate the intention of Parliament.

[39] This supports my view expressed earlier.

G **[40]** Further, at p. 217, the learned judge said:

A person who is entitled to practise as an advocate and solicitor under the Legal Profession Act 1976 is one with a practising certificate. Accordingly, the term 'advocate and solicitor' in s. 23A(1) must be construed as a reference to an advocate and
H solicitor who has been in practice under the Legal Profession Act 1976. This interpretation does not do any violence to the language employed in s. 23A(1) and is consistent with the object of the section as discussed earlier. It must thus be preferred in accordance with the requirement of s. 17A. The answer to the question posed for our determination would therefore be in the
I negative.

[41] Note that s. 23(1) uses the words "an advocate and solicitor within the meaning of the Legal Profession Act 1976" while art. 123 uses the words "an advocate of those courts". In s. 3 of the Legal Profession Act 1976 "advocate and solicitor" and "solicitor" are defined as follows:

> "advocate and solicitor", and "solicitor" where the context requires means an advocate and solicitor of the High Court **admitted and enrolled** under this Act or under any written law prior to the coming into operation of this Act; (emphasis added).

[42] So, even though s. 23(1) of the Industrial Relations Act 1967 specifically refers to the definition of "advocate and solicitor" in the Legal Profession Act 1976 and the definition in the latter Act only speaks about "admitted and enrolled" and not "practise", this court had interpreted the words "advocate and solicitor", in the context used in s. 23(1) of the Industrial Relations Act 1967 to mean a practising advocate and solicitor.

[43] On the other hand, art. 123 of the Constitution makes no reference to the definition of "advocate and solicitor" in the Legal Profession Act 1976. So, in my view, there is a stronger reason to hold that the word "advocate" as used in art. 123 of the Constitution, means a practising advocate. In other words, compared to *All Malayan Estates Staff Union v. Rajasegaran & Ors (supra)* there is a stronger ground for the word "advocate" to be given the meaning of a practising advocate in the instant case.

[44] To summarise my findings, even though the Constitution does not provide that to qualify to be appointed as a judge or a judicial commissioner, an advocate must be a practising advocate having a practising certificate, considering the two categories ie, "an advocate" and "a member of the legal and judicial service" together, the more reasonable interpretation that should be given to the word "advocate" is a practising advocate. This is further strengthened by the requirement that an advocate or a member of the judicial and legal service must have been so for ten years. That requirement can only mean to enable the advocate or the officer to gain experience at the bar or in the service before he is appointed. Otherwise, that requirement serves no purpose whatsoever. Unlike in Singapore where a person who has been a "qualified person" for an aggregate period of not less than ten years is qualified to be appointed a judge, in Malaysia he must have been "an advocate of those courts" for ten years preceding

A the appointment. The difference is clear. In Singapore, one does not have to be an advocate at all to qualify to be appointed a judge. He only has to pass the final examination for the degree of Bachelor of Laws from the universities mentioned. So, in Singapore, the requirement to practise does not arise. Unlike in
B Singapore too, the Constitution makes no reference to the Legal Profession Act 1976 or any other relevant law. So, the meaning to be assigned to the word "advocate" is not confined to the meaning of the same word used in the Legal Profession Act 1976. In any event, I do not find the definition of "advocate and
C solicitor" in the Act of any assistance. Other provisions in the Act are not of much assistance either, except that without a practising certificate, a person cannot practise as an advocate and solicitor. If he cannot practise, then, it is meaningless to apply the ten-year requirement to him. It does not serve any purpose.

D

[45] The definition of the word "advocate" in s. 3 of the Interpretation Acts 1948 and 1967 also supports the conclusion that the word must mean an advocate having a practising certificate, otherwise he is not "entitled to practise".

E

[46] The requirement that a person must be an advocate for at least ten years is meant to cover advocates and solicitors who practise law. It is not meant to include people who is "only in name" an advocate and solicitor merely by virtue of being admitted
F to the bar but spend their lives doing something else, whether teaching law, in business or politics. If they are intended to be included, the Constitution would and should have said so, as in Singapore or, more clearly in India which provides that a "distinguished jurist" is also qualified to be appointed a judge.

G **[47]** Furthermore, this court has only last year interpreted the provision of s. 23A(1) of the Industrial Relations Act 1967 to mean a practising advocate and solicitor even though that section specifically refers to the meaning of "advocate and solicitor" in the Legal Profession Act 1976 which only speaks of an advocate and
H solicitor who has been admitted and enrolled as such. The definition of the word "advocate" in art. 123 of the Constitution is not restricted to the meaning given in the Legal Profession Act 1976. I am unable to find any fault in that judgment to justify me to disagree with it. I am unable to find any justification to depart
I from it. On the other hand, to hold otherwise would lead to an absurd result in which, a non-practising advocate may not be

appointed a Chairman of the Industrial Court but may be appointed a Judicial Commissioner, a judge of the High Court, a judge of the Court of Appeal, a judge of the Federal Court or even the Chief Justice. He does not have to practise law even for a day. All he has to do is to get admitted to the Bar, then may be go into business and/or into politics and after ten years he is qualified to be a appointed even as a Chief Justice. That is the implication if this court were to rule otherwise.

[48] It may be that the time has come for other categories of persons eg, academicians to be included as persons qualified to be appointed as judges especially in such areas of law as intellectual property, conventional and Islamic finance and banking and so on. But that is a matter of policy for the Government to decide. It is not right for the court to rewrite the Constitution under the pretext of interpreting it to sneak in someone under the two existing categories when, he or she does not really belong to either of them.

[49] This judgment is not about the suitability of Dr. Badariah to be appointed a Judicial Commissioner. Academically, she is definitely one of the most, if not the most "qualified" person to be appointed a Judicial Commissioner. This judgment is about who is qualified to be appointed a judicial commissioner or a judge under the existing law, in particular, what is meant by "an advocate" in art. 123 of the Constitution.

[50] For the reasons given above, in my judgment, Dr. Badariah, not having practised law at all since her admission to the Bar does not qualify to be appointed a Judicial Commissioner.

[51] I would therefore answer question (i) in the affirmative. My answer to question (iii) is in the affirmative. In view of my answer to question (i), question (ii) becomes irrelevant.

[52] Following the judgment of this court in *All Malayan Estates Staff Union v. Rajasegaran & Ors (supra)*, I hold that even though the appointment of Dr. Badariah is invalid, all her judgments and orders handed down by her as a Judicial Commissioner is not a nullity by reason of the defect in her appointment.

[53] This reference should be allowed but as it is a matter of public interest, I would order that no order for costs be made in this or in the court below.

Nik Hashim FCJ:

[54] This reference of constitutional question under s. 84 of the Courts of Judicature Act 1964 relates to the question whether the appointment of Dr. Badariah binti Sahamid as a Judicial Commissioner (JC) of the High Court of Malaya with effect from 1 March 2007 is valid.

[55] I have read through the draft judgments of the learned Chief Justice and my learned brothers Hashim Yusoff, Azmel Maamor and Zulkefli Ahmad Makinudin, FCJJJ and I find their Lordships' judgments well reasoned and comprehensive.

[56] This is my judgment, *albeit* a short one.

[57] A broad and liberal interpretation should be given to the phrase "advocate of those courts" under art. 123 of the Federal Constitution (the FC). This call is in accord with a well-established principle that a Constitution should be construed with less rigidity and more generosity than other statutes (*Minister of Home Affairs v. Fisher* [1980] AC 319 at p. 329; *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor* [1992] 2 CLJ 1125, [1992] 1 CLJ (Rep) 72; *Kamariah Ali dan Yang Lain lwn. Kerajaan Negeri Kelantan dan Satu Lagi* [2004] 3 CLJ 409).

[58] Barwick CJ when delivering the decision of the High Court of Australia in *Attorney General of the Commonwealth, ex relatione McKinley v. Commonwealth of Australia* [1975] 135 CLR 1 said at p 17:

> the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

See also *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 per Raja Azlan Shah Ag. LP (as His Royal Highness then was).

[59] Therefore, taking the above approach to the case before us, the interpretation as requiring only an advocate and solicitor who has been in practice (in possession of a practising certificate) preceding the appointment before he could be qualified as a JC or a judge of the High Court, would amount to reading words which are not in art. 123 of the FC, and surely this is a wrong

thing to do for the term "advocate" in the FC appears to have the same meaning as "advocate" and "advocate and solicitor" under s. 66 of the Interpretation Acts 1948 and 1967 (Act 388) (Part II) to mean an advocate and solicitor of the High Court, and under s. 3 of the Legal Profession Act 1976 (Act 166) the phrase "advocate and solicitor" means an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act. So, in the present case, although Dr. Badariah has no practising certificate under Act 166, she is an advocate and solicitor as she had been admitted and enrolled as one and there is nothing in s. 3 to say that to be an advocate and solicitor one must have a practising certificate (see *M Samantha Murthi v. The Attorney-General & Ors* [1982] CLJ 241; [1982] CLJ (Rep) 213). Thus, an "advocate of those courts" under art. 123 of the FC does not necessarily need to be a practising advocate and solicitor.

[60] In this regard, I, with respect, agree with the learned Attorney General that the Bar Council's interpretation of art. 123 of the FC as requiring an advocate and solicitor who must have been in practice (in possession of a practising certificate) preceding the appointment was too rigid. A generous interpretation is called for in this case as Dr. Badariah could be considered as practising in a wider sense as she was teaching law to her students in the University of Malaya before her appointment as a JC. Therefore, in my view, the main criterion for the appointment as a JC or a judge of the High Court is that the candidate must had been called to the Bar and admitted and enrolled as an advocate and solicitor for 10 years and it does not matter if the candidate, like Dr. Badariah here, did not possess a practising certificate preceding the appointment. That is the minimum qualification, besides being a citizen, required of the members of the Bar for the appointment. Of course with that qualification, it is up to the powers that be to appoint a suitable candidate for the appointment.

[61] The Federal Court case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195 is inapplicable to and readily distinguishable from, the present case. Unlike the present case, which involves the construction of a provision in the FC, the Federal Court in *Rajasegaran* considered and construed the words "advocate and solicitor" in the context of the Industrial Relations Act 1967 an ordinary Act of Parliament according to ordinary rules of statutory interpretation.

[62] And for those reasons, I uphold the appointment of Dr. Badariah as a JC valid as she was an advocate and solicitor of the High Court of Malaya for more than 10 years, a PhD, Law holder and also a professor at the University of Malaya before the appointment. Accordingly, my answers to questions (i) and (ii) are in the negative and affirmative respectively, while question (iii) is deemed unnecessary in view of my answer to question (i).

Hashim Yusoff FCJ:

[63] This is an application by summons in chambers from the High Court to refer a question by way of a special case to the Federal Court for determination pursuant to s. 84 of the Courts of Judicature Act 1964.

[64] We heard the arguments on 22 October 2007 and reserved our judgments. I had the benefit of reading the judgments of my learned brothers Abdul Hamid Mohamad, CJ and Zulkefli bin Ahmad Makinudin, FCJ to which, I have with respect, a different view. This is my judgment.

Background

[65] At the High Court, the plaintiff applied for a declaration that the appointment of Dr. Badariah bte Sahamid as a Judicial Commissioner of the High Court of Malaya is null and void and is of no effect on the ground that the said appointment is in contravention of art. 122AB read together with art. 123 of the Federal Constitution. The plaintiff also applied for any further relief which the court deemed fit to give.

[66] The defendant then applied to the High Court to refer to the Federal Court for determination pursuant to s. 84 of the Courts of Judicature Act 1964 the following questions:

i) Whether the words "advocates of those courts" appearing in art. 123 of the Federal Constitution require an Advocate to have been in practise for a period of ten years preceding his/her appointment as a Judicial Commissioner under art. 122AB of the Federal Constitution?

ii) If the answer to question 1 is in the negative, is the appointment of YA Dr. Badariah Sahamid as a Judicial Commissioner of the High Court of Malaya with effect from 1 March 2007 valid?

iii) If the answer to question 1 is in the affirmative, is the appointment of YA Dr. Badariah Sahamid as a Judicial Commissioner of the High Court of Malaya with effect from 1 March 2007 null and void?

[67] The learned High Court judge then granted Order in Terms of the defendant's application. Hence this reference to this court.

Issue

[68] The issue to be decided by this court is as follows:

> Whether an Advocate & Solicitor of the High Court of Malaya who has not been practising for 10 years preceding her appointment is qualified for appointment as a Judicial Commissioner under Article 123 (read with Article 122AB) of the Federal Constitution.

Qualification & Expertise Of The Respondent

[69] Dr. Badariah Sahamid obtained her Bachelor of Laws degree, (First Class Hons) from the University of Malaya in 1978, Master of Laws (LLM) from the London School of Economics and Political Science (LSE) University of London, in 1979 and a Doctorate from the University of Malaya in 2001.

[70] She then became a law lecturer at the Faculty of Law, University of Malaya and eventually a Professor until her appointment as a Judicial Commissioner on 1 March 2007.

[71] Dr. Badariah then petitioned for admission and enrolment as an advocate and solicitor. On 26 September 1987 she was admitted as an advocate and solicitor of the High Court of Malaya. On 1 March 2007 Dr. Badariah was appointed as a Judicial Commissioner of the High Court of Malaya.

[72] The plaintiff then challenged Dr. Badariah's appointment on the ground that she had not satisfied the requirements of art. 123 of the Federal Constitution as she had not been in legal practise, though she was admitted as an advocate and solicitor, for more than 10 years, preceding her appointment.

[73] Mr. Robert Lazaar learned counsel for the plaintiff submitted that the words "an advocate of those courts" in art. 123 of the Federal Constitution mean an advocate who is in practise as an advocate. Since the word "advocate" is not defined in art. 123,

A one would have to get its meaning by looking at s. 66 of the Interpretation Acts 1948 & 1967 where the words "advocate, advocate and solicitor" mean an advocate and solicitor of the High Court.

B **[74]** It was submitted that under s. 3 of the Legal Profession Act 1976, the words "advocate and solicitor", and "solicitor" where the context requires, mean an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act.

C **[75]** It was submitted further that the words "he has been an advocate of those courts" in art. 123, would refer to his vocation, ie, he must be in active practice as an advocate. And no person shall practise as an advocate and solicitor … unless his name is on the Roll and he has a valid practising certificate authorising him to do the act; (see s. 36(1) of the Legal Profession Act).

(Reference was also made to s. 30(1) of the Legal Profession Act 1976 which states:

> (1) No advocate and solicitor shall apply for a practising certificate:
>
> (a) …
>
> (b) …
>
> (c) If he is gainfully employed by any other person, firm or body on a capacity other than as an advocate and solicitor)

[76] Since Dr. Badariah has no valid practising certificate, it was G submitted that she has therefore not been an advocate of those courts as mentioned in art. 123 of the Federal Constitution. That being so, she is said to have failed to meet the requirement of art. 123. Her appointment as a Judicial Commissioner should therefore be null and void.

H **[77]** The learned Attorney General appearing on behalf of the Government/defendant argued that since the word "practising" is not found in art. 123 of the Federal Constitution; there is therefore no need for one to be a practising advocate. He referred I to the case of *C.P. Agarwal v. C.D. Parikh* [1970] SC AIR 1061, where the appellant filed a writ petition in the High Court of Allahabad for a *quo warranto* against 1st respondent, challenging

therein his appointment as a judge of the High Court. The ground on which he challenged the appointment was that although 1st respondent was enrolled as an advocate more than 20 years ago, he could still not claim to be one who "has for at least ten years been an advocate of a High Court" within the meaning of art. 217(2)(b) of the Constitution, as admittedly 1st respondent was all along practising at Benaras and not in the High Court. At the preliminary hearing before W. Broome and G. Kumar JJ, there was a difference of opinion between the two judges.

[78] Broome J held that "on a plain reading of the relevant clauses" the correct interpretation of the expression "an advocate of a High Court" meant an advocate enrolled as an advocate of a High Court, irrespective of whether on such enrolment he practised in a High Court or Courts Subordinate to the High Court.

[79] G. Kumar J on the other hand, accepted the contention urged on behalf of the appellant and held that the expression "an advocate of a High Court" meant one who has practised for a required period in a High Court, and therefore, a person who has practised only in a court or court subordinate to the High Court would not answer the qualification required under art. 217(2)(b).

[80] The matter was then referred to Mathur J who agreed with Broome J. On appeal to the Supreme Court, Shelat J, delivering the judgment of the Court said at p. 1062, para 4 thus:

> In our opinion the language used in Article 217(2)(b) is plain and incapable of bearing an interpretation other than one given by Broome J. … His lordship went on to say at para 5.
>
> if it was intended than the qualification under Article 217 (2)(b) should be that a person appointed to the office of a Judge of a High Court should have practised in a High Court and that practising in a Court or Courts Subordinate to it would not answer the qualification, the language used in sub-clause (b) of Article 217(2) would have been as follows:
>
> > A person shall not be qualified for appointment as a Judge of a High Court unless he has for or at least ten years practised as an advocate in a High Court or in two or more such courts in succession.

A Further, Shelat J said at page 1064 para 8; "It seems, therefore, indisputable that … the expression of "an advocate of a High Court" used in Article 217(2)(b) must mean …. an advocate on the roll as such of a High Court and entitled as of right by that reason to practice in the High Court. There is nothing in any of these provisions to indicate that an advocate of a High Court can only be that advocate of a High Court who has been practising in the High Court.

[81] In the instant case the learned Attorney General argued that the wordings of art. 123 of the Federal Constitution as well as s. 3 of the Legal Profession Act 1976 are very clear. Therefore there is no need to give a purposive interpretation to art. 123.

[82] Article 123 of the Federal Constitution reads as follows:

A person is qualified for appointment under Article 122B as a judge of the Federal Court, as a judge of the Court of Appeal or as judge of any of the High Courts if:

(a) He is a citizen; and

(b) For the **ten years preceding his appointment he has been an advocate of those courts** or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another. (emphasis added)

[83] Article 122AB of the Federal Constitution reads:

(1) For the dispatch of business of the High Court in Malaya and the High Court in Sabah and Sarawak, the Yang di-Pertuan Agong acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court, may by order appoint to be judicial commissioner for such period or such purposes as may be specified in the order any person qualified for appointment as a judge of the High Court; and the person so appointed shall have power to perform such functions of a judge of the High Court as appear to him to require to be performed; and anything done by him when acting in accordance with his appointment shall have the same validity and effect as if done by a judge of that Court, and in respect thereof he shall have the same powers and enjoy the same immunities as if he had been a judge of that Court.

Principles Of Constitutional Interpretation

[84] At the outset I am mindful that the issue involves the interpretation of not an ordinary statute but the Federal Constitution, the supreme law of Malaysia.

[85] As early as 1981 in *Merdeka University Bhd v. Government of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191, Abdoolcader J (as he then was) stated the principles of constitutional interpretation thus:

> It will be necessary in connection with my discussion in this regard to deal with and construe certain provisions of the Federal Constitution and I should perhaps before doing so advert somewhat briefly and generally to the principles of constitutional interpretation which apply. The Privy Council held in *Minister of Home Affairs v. Fisher* [1973] 3 All ER 21 (at page 329) that a Constitution should be considered with less rigidity and more generosity than other statutes (also *Attorney-General of St. Christopher, Navis and Anguilla v. Reynolds* [1979] 3 All ER 129, 136 (at page 655) and as *sui generis*, calling for principles of its own, suitable to its character but added that respect must be paid to the language which has been used, and in *Teh Cheng Poh v. Public Prosecutor* [1979] said (at [1978] 1 LNS 202) that in applying constitutional law the court must look behind the label to the substance. Barwick, CJ, said in the High Court of Australia in *McKinlay v. The Commonwealth of Australia* [1975] 135 CLP 1 (at page 17):
>
> > The only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole: and to find its meaning by legal reasoning.
>
> I said in *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 LNS 92 that the Constitution is not to be construed in any narrow or pedantic sense (*James v. Commonwealth of Australia* [1936] AC 578 (at page 614)) but this does not mean that a court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors. The High Court of Australia in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* [1920] 28 CLR 129. Eschewed so called 'political criteria' in the interpretation of the Australian Constitution and so lessened considerably the range of circumstances where it might called upon to interene more directly in political processes.

[86] In *Dr. Mohd. Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19, the Court of Appeal referred to the relevant authorities on constitutional interpretation. Gopal Sri Ram JCA expressed as follows:

> The proper approach to the interpretation of our Federal Constitution is now too well settled to be the subject of argument or doubt. It is to be found in the joint dissent of Lord Nicholls of Birkenhead and Lord Hope of Craig Head in the Privy Council case of *Prince Pinder v. The Queen* [2002] UKPC 46.
>
> It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of court is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provisos derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given 'strict and narrow', rather than broad, constructions': see *The State v. Petrus* [1985] LRC (Const) 699, 720d-f, per Aguda JA in the Court of Appeal of Botswana, applied by their Lordships' Board in *R v. Hughess* [2002] 2 AC 259, 277 part 35.

[87] More than 20 years earlier, in *Dato' Menteri Othman Baginda & Anor. v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98, Raja Azlan Shah LP (as His Royal Highness then was) expressed the same view.

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters or ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v. Fisher*) [1973] 3 All ER 21. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition and rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full

recognition and effect of those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney-General of St Christopher, Navis and Anguilla v. Reynolds* [1979] 3 All ER 129, 136.

It is in the light of this kind of ambulatory approach that we must construe our Constitution:

[88] The long and short of it is that our Constitution – especially those articles in it that confer on our citizens the most cherished of human rights – must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.

[89] The other aspect to interpreting our Constitution is this. When interpreting the other parts of the Constitution, the court must bear in mind all the providing provision of art. 8(1). That article guarantees fairness of all forms of State action. See, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771.

It is my respectful view that when interpreting our Federal Constitution one must bear in mind the all pervading provisions of Article 8(1) (see *Dr. Mohd. Nasir Hashim v. Menteri Dalam Negeri Malaysia*)' To read into Article 123 of the Federal Constitution the words "a practising" before the word "advocate" is to deprive the Respondent of equality before law, a fundamental liberty under our Constitution. Article 8(1) does not declare that all persons must be treated alike but that persons in like circumstances must be treated alike. In *Public Prosecutor v. Khong Teng Khen & Anor* [1976] 2 MLJ 166, 170, Suffian LP said for the Federal Court: "The principle underlying Article 8 is that a law must operate alike on all persons under the circumstances, not that it must be general in character and Universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation' ... the law may classify persons ... the law may classify offences into different categories ...; ... fiscal law may divide a town into different areas ... All that Article 8 guarantees is that a person in the same class should be treated the same as another person in the same class ...

Definition Of "Advocate And Solicitor"

[90] Section 3 of the Legal Profession Act 1976 (Act 166) defines an advocate & Solicitor as follows:

A In this Act unless the context otherwise requires:

"advocate and solicitor", and "solicitor" where the context requires means an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act.

B

The words "advocate & solicitor" within the meaning of the Legal Profession Act 1976 had been considered in at least two cases in the Malaysian courts.

C **[91]** In *M. Samantha Murthi v. The Attorney-General & Ors* [1982] CLJ 241; [1982] CLJ (Rep) 213 where the Federal Court was interpreting s. 13(1) of Act 166 (Legal Profession Act 1976) Suffian LP in delivering the judgment of the court ruled:

D What is in dispute in this case is the meaning which we should give to the phrase "active practice in Malaysia" in s. 13(1). As earlier stated, that section provides that "a pupil shall serve his period of pupilage with an advocate and solicitor who is or has been in active practice in Malaysia etc." Thus there are two requirements: First, the master must be:

E (1) "an advocate and solicitor" within the meaning of s. 3 of the Act: and

(2) He "is or has been in active practice in Malaysia".

F The learned Judges in the High Court ruled that Mr. Reddy is not an advocate and solicitor under s. 3 because he does not hold a practising certificate issued under s. 29 of the Act authorizing him to practice at the Malayan Bar. With respect we do not agree with this ruling, because there is nothing in s. 3 to say that he must be in possession of such a certificate. In fact Mr. Param G Cumaraswamy conceded that Mr. Reddy is an advocate and solicitor under s. 3. Under this section an advocate and solicitor is defined as:

An advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into H operation of this Act.

The section does not say that to be an advocate and solicitor one must have a practising certificate. In our judgment Mr. Reddy is an advocate and solicitor within the Act although he has no I practising certificate under the Act. As long as he has been "admitted and enrolled" under the Act or any previous written law, he is an advocate and solicitor within the meaning of the Act.

A practising certificate is not a requirement of s. 3. but of s. 29, which has nothing to do with the definition. The learned judges were therefore in error when they said:

He [Mr. Reddy] can only be an advocate and solicitor who is in practice if he holds a practising certificate issued under s. 29 of the Legal Profession Act.

As regards the second requirement under s. 13(1), ie, that Mr. Reddy must be a person who "is or has been in active practice in Malaysia", there is no doubt that he is and has been in active practice in Sarawak which is part of Malaysia.

[92] In the more recent case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* the Federal Court again had to consider the meaning of advocate & solicitor in s. 23 A(1) of the Industrial Relations Act 1967 (IRA). The Federal Court gave leave to appeal on the following issue:

Whether an Advocate and Solicitor within the meaning of the Legal Profession Act 1976 who has been not been practising for the 7 years preceding his appointment is qualified to be appointed as chairman of the Industrial Court under s. 23A Industrial Relations Act 1967.

[93] The Federal Court's answer to the question posed was in the negative.

Interpretation Of art. 123 Of The Federal Constitution

[94] In the above two cases the Federal Court considered the rules of construction in interpreting statutes such as the literal rule and the purposive approach under s. 17A of the Interpretation Acts 1948 & 1967.

[95] I am in agreement with the principles of statutory interpretation adopted by the courts in respect of the relevant legislations in arriving at the decisions in the above two cases.

[96] In the instant case the court is interpreting the Federal Constitution which is a constitutional instrument *sui generis* to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation (see *Minister of Home Affairs v. Fisher*, cited with approval in *Merdeka University Bhd, Dr Mohd. Nasir Hashim* and *Dato' Menteri Othman Baginda, supra*)

[97] The Legal Profession Act, governing the legal profession, has provisions relating to "advocate in active practise", advocate having a practising certificate and "a practising advocate" eg, s. 13(1), 21(1), 36 and 38(g) and the draftsman being aware, as he must have been of such provisions would surely spell out 'practising advocate' requirements in art. 123 of the Federal Constitution if he had intended such a limitation in art. 123.

[98] Moreover, it is fallacious to argue that legal experience if indeed it is a requirement of art. 123, can only be obtained as a "practising advocate". While legal experience can commonly be gained by legal practise it is not the only or exclusive means of gaining legal experience. Section 38(g) of the Legal Profession Act specifically recognizes a full-time law lecturer acting as an advocate and solicitor in solely advisory capacity upon instructions from a practising advocate and solicitor.

[99] What more, a person is qualified for appointment as a judge of the High Court if he has been a member of the Judicial and Legal Service for the ten years preceding his appointment even if he were to have been posted in the Drafting Division of the Attorney General's Chambers and may not even have gone to court even once during his tenure there.

[100] Dr. Badariah had wide knowledge and experience in several areas of the law and legal cases that come before the courts. This can be seen from her affidavit filed therein. Indeed as a lecturer in law she has been responsible in teaching and training numerous advocates and solicitors. I can see no valid reason why a person of her standing and experience in the law should be deprived of her privilege and benefit of being appointed as a Judicial Commissioner. The administration of justice and the public has more to gain than lose if she was appointed as a Judicial Commissioner.

[101] The definition of "advocate" in s. 3 of the Interpretation Acts 1948 & 1967 (Act 388) does not appear to apply to the interpretation of the word "advocate" in the Federal Constitution. Section 2 of Act 388 reads:

> (1) Subject to this section, Part I of this Act shall apply for the interpretation of and otherwise in relation to:
>
> (b) This Act and all Acts of Parliament enacted after 8th. May 1967;

(c) All laws, whether enacted before or after the commencement of this Act, revised under the Revision of Laws Act 1968;

(d) All subsidiary legislation made under this Act and under Acts of Parliament enacted after the commencement of this Act;

(e) All subsidiary legislation, whether made before or after the commencement of this Act, revised under the Revision of Laws Act 1968;

(f) All subsidiary legislation made after the 31st. December 1968, under the laws revised under the Revision of Laws Act 1968.

(2) Part I shall not apply the interpretation of or otherwise in relation to any written law not enumerated in subsection (1).

[102] The Federal Constitution was enacted in 1957. The Federal Constitution does not come within any of the categories of Acts of Parliament or written law enumerated in subsection (1). Under subsection (2), Acts not so enumerated are excluded from the application of Part 1 of Act 388. However, the definition of an "advocate" under s. 66 of the Act 388 (Part II) appears to apply to interpretive meaning of "advocate" in the Federal Constitution. "Advocate" and "advocate and solicitor" under s. 66 means an advocate and solicitor of the High Court. Under s. 66 of Act 388 the definition therein apply to every written law as hereinafter defined, and in all public documents enacted, made or issued before or after 31 January 1948. The Federal Constitution enacted in 1957 would come within the definition of such "written law". "Written law" under s. 66 means "all Acts of Parliament, Ordinances and Enactments in force in the Federation or any part thereof and all subsidiary legislation made thereunder, and includes the Federal Constitution".

[103] Even if s. 17A of Act 388 applies art. 123 of the Federal Constitution read together with s. 3 of the Act are clear and unambiguous in their terms.

[104] Article 123 of the Federal Constitution was enacted especially for a specific purpose, that is, to provide for the qualification of *inter alia*, for the appointment of a judge of the High Court. The court has to give effect to the plain meaning of the words used in the article rather than inventing ambiguities in

them. The Federal Court in *Malaysian Bar v. Dato' Kanagalingam Veluppillai* [2004] 4 CLJ 194 at p. 200 agreed with the observation made by Lord Diplock in *Duport Steels Ltd & Ors v. Sirs and Ors* [1980] 1 WLR 142 at p. 157, wherein his Lordship said:

> Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning.

[105] The court cannot read into art. 123 the words "a practising" before the word "advocate". It cannot stretch the language of the Constitution for the purpose of supplying omissions or of correcting supposed errors (see *Merdeka University, supra*).

> Article 123 of the Federal Constitution used the word "advocate" while art. 5(3) of the Federal Constitution used the words "a legal practitioner" (that is one who is a practising advocate).
>
> The usage of different words in the Federal Constitution point to different meanings being attributed to them. Thomson CJ in *Lee Lee Cheng v. Seow Peng Kwang* [1958] 1 LNS 32; [1960] MLJ 1 at p. 3 said:
>
> > It is axiomatic that when different words are used in a statute they refer to different things …

[106] Similarly in art. 123 of the Federal Constitution if Parliament had intended that only legally qualified appointees who had actually practised for 10 years to qualify for appointment as a High Court judge or judicial commissioner, the draftsman would have used the words "a practising advocate" or "legal practitioner" instead of the word "advocate" in art. 123 of the Federal Constitution. Interpreting art. 123 of the Federal Constitution broadly and not a pedantic way (see *Dato' Menteri Othman Baginda*) would produce the same result reached in *M. Samantha Murthi* as to the meaning of the word "advocate" where the Federal Court held that as long as a person has been "admitted and enrolled" under the Legal Profession Act or under any previous written law then he is an advocate and solicitor within the said Act.

[107] The case of *Rajasegaran* is distinguishable on the ground that in that case the Federal Court considered and interpreted the words "advocate and solicitor" in the context of the Industrial Relations Act, an ordinary legislation according to ordinary rules of statutory interpretation.

[108] That being the case, I hold that Dr. Badariah was qualified to be appointed as a Judicial Commissioner as she had been an advocate of the High Court of Malaya for 10 years preceding her appointment within the meaning of art. 123 of the Federal Constitution. I would therefore answer question (i) in the negative. It follows that the answer to question (ii) is in the affirmative. That being so, question (iii) therefore falls by itself.

Azmel Maamor FCJ:

[109] I have the benefit of reading the judgments in draft of my four learned brothers. After having considered them I would agree with the views expressed and the decision arrived by my learned brother Hashim Yusoff FCJ. In support of his lordship's judgment I hereby state my views.

[110] The facts of this case, which are not disputed, have been well narrated by my learned brother Abdul Hamid Mohamad CJ in his judgment and I do not wish to repeat them here.

[111] This court has been requested to construe the provision of art. 123 of the Federal Constitution which deals with the qualification of a person to be appointed as a Judicial Commissioner, specifically, whether the words "advocates of those courts" appearing in art. 123 of the Federal Constitution require an advocate to have been in practise for a period of ten years preceding his/her appointment as a Judicial Commissioner under art. 122AB of the Federal Constitution.

[112] At the hearing counsel for the plaintiff strenuously submitted that it would be a mandatory requirement that the advocate must possess a practising certificate in order to be qualified to be appointed as a Judicial Commissioner. The learned Attorney General on behalf of the defendant, however, argued that the wordings of art. 123 of the Federal Constitution are clear and unambiguous and as such the article must be given its literal meaning without the need to use the purposive approach in interpreting it.

[113] At the outset I must say it is of paramount importance to bear in mind that in interpreting the provisions of a constitution being the supreme law of a country the generally accepted principles of constitutional interpretation would have to be applied. Those principles are not the same as the ones normally used in

A interpreting an ordinary statute or law. There have been several decided cases in respect of this subject matter. Some of those cases have been referred to by my learned brother Hashim Yusoff FCJ in his judgment. One of such cases is *Merdeka University Bhd v. Government of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191 B where Eusoffe Abdoolcader J (as he then was) had delved in detail those principles by referring to several other cases from which these principles were established. In his judgment his lordship also quoted the landmark case of *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 C CLJ (Rep) 98 where Raja Azlan Shah Ag. LP (as His Royal Highness then was) had also clearly stated the general principles in constitutional interpretation. And I do not wish to restate them here. Suffice it for me to state a few of the principles which I consider relevant to be applied in the instant case, namely:

D

i) A constitution should be considered with less rigidity and more generosity than other statutes.

ii) The only true guide and only course which can produce stability in constitutional law is to read the language of the E Constitution itself, no doubt generously and not pedantically, but as a whole and to find a meaning by legal reasoning.

iii) The constitution is not to be construed in any narrow or pedantic sense.

F iv) A vitally important function of the Court is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford.

v) Provisions derogating from the scope of guaranteed rights are G to be read restrictively.

vi) Judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation.

vii) Respect must be paid to the language which has been used H and to the traditions and usages which have given meaning to that language.

[114] I shall now apply the aforesaid principles of constitutional interpretation in dealing with the instant case as it involves a I provision of the Federal Constitution. Firstly, the term "advocate and solicitor" or "advocate" had been decided differently by two different Federal Court cases. In the case of *M. Samantha Murthi*

v. The Attorney-General & Ors [1982] CLJ 241; [1982] CLJ (Rep) 213 the panel of three renowned Federal Court judges all of whom had held the post of Lord President (Suffian, Raja Azlan Shah and Salleh Abas) in interpreting s. 13(1) of the Legal Profession Act 1976 (LPA), Suffian LP, in delivering the decision of the court, ruled:

> The section does not say that to be an advocate and solicitor one must have a practicing certificate. In our judgment Mr. Reddy is an advocate and solicitor within the Act although he has no practicing certificate under the Act. As long as he has been "admitted and enrolled" under the Act or any previous law he is an advocate and solicitor within the meaning of the Act.

[115] The recently decided Federal Court case of *All Malayan Estate Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195 ruled that for purposes of s. 23A of the Industrial Relations Act 1967 (IRA) in order for an advocate and solicitor to be qualified to be appointed as a Chairman of the Industrial Court he must have a practising certificate.

[116] So we are faced with two conflicting decisions of the Federal Court on the same issue. Which of the two should we follow. We must be reminded that we are construing the provision of the Federal Constitution and not an ordinary statute. As such the principles regarding constitutional interpretation have to be adhered to. One of such principles as I have stated above states that a constitution is not to be construed in any narrow or pedantic sense. It should be considered with less rigidity and more generosity than other statutes. It is quite obvious to me that the *Rajasegaran* case had been construed narrowly or rigidly by inserting into its meaning the need to have a practising certificate when the words "practising certificate" were not so provided in art. 123 of the Federal Constitution. Hence for this court to be governed by the decision in *Rajasegaran* case would tantamount to deciding contrary to the generally accepted principles of constitutional interpretation. In my view the decision in *Rajasegaran* case should be ignored. On the other hand the decision in *MS Murthi* case would be a more appropriate case for this court to follow. A closer look at the decision of Suffian LP in *MS Murthi* case one can clearly see that the approach the court took in interpreting s. 13(1) of the LPA was akin to the principles of constitutional interpretation by not giving a narrower or restrictive meaning of the term "advocate and solicitor".

[117] The Indian case of *C.P. Agarwal v. C.D. Parikh* [1970] SC AIR 1061 referred to by the learned Attorney-General in his submission and also mentioned by my learned brother Hashim Yusoff FCJ in his judgment would also give support to the usage of principles of constitutional interpretation in construing constitutional provision. In interpreting a constitutional provision one cannot infer any additional word in the article if the effect of such addition would be to create a rigidity or narrowness in the meaning of that constitutional provision. Any such addition should only serve to enlarge or broaden the meaning. Hence the word "generosity" is mentioned in one of the above said principle.

[118] To apply the undisputed facts of this case, Dr. Badariah Sahamid's legal qualification is impeccable. Even the counsel for the plaintiff admitted that what Majlis Peguam Malaysia is complaining is not her legal qualification but merely that Dr. Badariah does not have a practising certificate. In my view, getting a practising certificate after one has been admitted as an advocate and solicitor would not require further legal qualification. It only requires monitory or administrative qualification. On payment of an annual fee one can be issued with such practising certificate. Is not this a pedantic requirement? I say so because a person may have a practising certificate but that does not guarantee that he would be actively practising law. For as long as he pays the annual fee he will continue to have his practising certificate. Hence by requiring a person to have a practising certificate in order to be qualified to be appointed as a Judicial Commissioner would not guarantee that a person issued with a certificate would "actually" practise law. Yet he comes within the category of a "qualified person" to be appointed as a Judicial Commissioner. Even assuming that he actually practises law but deals with conveyancing matters which require no litigation works at all, would he then be a "proper" person qualified to be appointed as a Judicial Commissioner? In other words, the insistance of adding the words "practising certificate" within the meaning of art. 123 of the Federal Constitution would not guarantee us getting "proper" candidates for the appointment of a Judicial Commissioners. If we really want to have "really proper" qualified persons two other meaningful requirements should be added to the said article apart from merely having the practising certificate. They are:

i) "**actively** practising law; and

ii) The word **"immediately"** before the word "preceding".

[119] I have already explained why the need for a person having a practising certificate to be "actively practising law". In addition to that such person to be qualified for the appointment must be in active practise immediately preceding his appointment. We do not want a case of a person to have been in active practise for 10 years but then does work not related to legal practise for the next 20 years before being appointed a Judicial Commissioner, even though he may be a qualified person if the word "immediately" is not inserted before the word "preceding". If these 2 requirements are added then we may be able to get the "really appropriate and proper" qualification requirements.

[120] But should we do that? I think the answer should be in the negative. It would mean a number of judges already appointed to the judiciary would be declared to have been invalidly appointed eg, Yaacob Ismail J was appointed when he was employed by Petroleum Nasional Bhd. immediately preceding his appointment as a Judicial Commissioner. Syed Ahmad Idid J was employed by Public Bank Bhd. immediately preceding his appointment as a Judicial Commissioner. Both of them have served and left the judiciary without any objection by anybody. Rohana Yusof J was employed by Bank Negara immediately preceding her appointment as a Judicial Commissioner. Presently she is still serving as a High Court judge. Even though these three people were at one time members of the Judicial and Legal Service the moment they left the said service their eligibility would have also ceased. The eligibility, however, would be revived if they had been admitted as advocates and solicitors actively practising law immediately preceding their appointments. But they would not be able to actively practise law because they could not obtain their practising certificate since they were gainly employed.

[121] Another interesting case is that of Dr. Visu Sinnadurai J who was straightaway appointed as a High Court judge while serving as Commissioner for Law Revision for a few years (less than 10 years) immediately preceding his appointment. I remember he was appointed as a judge not long after I was appointed as a Judicial Commissioner in 1992. Prior to his appointment as the Commissioner for Law Revision he was gainfully employed as a Law Professor at the Law Faculty, University of Malaya. Could he be having a practising certificate while he was employed in the University and as a Commissioner for Law Revision? In my view

it would be legally impossible for him to be issued with a practising certificate because he was all the time gainfully employed which is a restriction to obtain a practising certificate as provided under s. 30(1) of the LPA. If he had been issued with a practising certificate while being gainfully employed then I must say that such issuance had been fraudulently made by the Bar Council having regard to the fact that he was all the time gainfully employed. In any case, Dr. Visu Sinnadurai J had left the service.

[122] Be that as it may the point I wish to make here is that the case of Dr. Visu Sinnadurai J can be regarded as a precedent as to how the previous appointing authorities construed art. 123 of the Federal Constitution concerning qualification for the appointment of candidates to be judges or Judicial Commissioners. It must also be remembered that the Bar Council did not raise any objection against such appointment.

[123] It must have been the thinking of the relevant appointing authorities then that Dr. Visu Sinnadurai was a person highly qualified and deserving to be appointed as a judge to the extent that he was appointed straight as a High Court judge without the need to undergo through the period judicial commissionership like all of us today. Undoubtedly he was a very known figure among the legal fraternity including the Bar Council. There was no objection by anybody including the Bar Council then. As such Dr. Badariah's appointment should, in my view, be viewed similarly as that of Dr. Visu Sinnadurai. Why in the case of Dr. Badariah there is an objection by the Bar Council? Why in one case it is condoned and in the other case it was objected to? Why the inequality of treatment in respect of these two persons? On this issue I would refer to the case mentioned by my learned brother Hashim Yusoff FCJ in his judgment ie, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 where the court made the following observation:

> It is my respectful view that when interpreting our Federal Constitution one must bear in mind the all prevailing provision of Article 8(1). (see *Dr. Mohd. Nasir Hashim v. Menteri Dalam Negeri Malaysia*). To read into Article 123 of the Federal Constitution the words "a practicing" before the word "advocate" is to deprive the Respondent of equality before the law; a fundamental liberty under our Constitution. Article 8(1) does not declare that all persons must be treated alike out that persons in the circumstances must be treated alike.

[124] In the light of the precedent created through the appointment of Dr. Visu Sinnadurai and the lack of objection by the Bar Council I am of the view that it would be highly unfair and certainly most unconscionable on the part of the Bar Council to practise a double standard. Such differing treatment by the Bar Council should not be condoned by this court at all.

[125] In the circumstances and for the reasons as stated above I would declare that Dr. Badariah binti Sahamid who is an advocate and solicitor although not having her practising certificate is a qualified person to be appointed as Judicial Commissioner within the meaning of art. 123 of the Federal Constitution. She was therefore validly appointed as a Judicial Commissioner. I therefore dismiss the plaintiff's claim with costs here and the court below.

Zulkefli Makinudin FCJ:

[126] I have read the judgment in draft of my learned brother Abdul Hamid Mohamad, CJ and I agree with the views expressed and the decision reached by his lordship on the questions referred for the determination of this court on the interpretation of art. 123 of the Federal Constitution. I would like to state my views in support of the judgment of his lordship on some of the issues raised by the parties as follows:

[127] The relevant background facts of the case and the three questions of constitutional issues referred to us for determination are as set out by his lordship Abdul Hamid Mohamad, CJ in his judgment.

[128] It is to be noted the word "advocate" in art. 123 is not defined in the Federal Constitution, but the meaning can be found in ss. 3 and 66 of the Interpretation Acts 1948 and 1967 ("the Interpretation Act"). Section 3 of the Interpretation Act states that an "advocate" means a person entitled to practise as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia. Section 66 of the Interpretation Act states that an "advocate" means an advocate and solicitor of the High Court and this provision only applies for the interpretation of any written law prior to its repeal with effect from 18 May 1967 (see s. 65 Interpretation Act). Section 3 of the Legal Profession Act 1976 ("LPA 1976") states that "advocate and solicitor" where the

A context requires means an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act.

[129] The Honourable Attorney General for the defendant B submitted before us that since the statutory definition in s. 3 of the Interpretation Act uses the word "means" in defining the word "advocate", it would thus limit the meaning of the word to what is set out in the definition. Therefore, the definition of "advocate" in s. 3 of the Interpretation Act must be limited to a C person duly entitled to practise as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia.

[130] It was argued for the defendant that under the LPA 1976 there are three specific circumstances where a person is entitled to practise as an advocate or as an advocate and solicitor, namely: D

(i) a qualified person duly admitted as an advocate and solicitor under s. 10 of the LPA 1976;

(ii) a qualified person admitted to practise as an advocate and E solicitor under s. 18 of the LPA 1976; and

(iii) a person duly admitted as an advocate and solicitor under s. 28B of the LPA 1976, by virtue of a "Special Admission Certificate" issued by the Attorney General under s. 28A.

F **[131]** It was further argued for the defendant since Dr. Badariah bte. Sahamid had been admitted as an advocate and solicitor in 1987 under s. 10 of the LPA 1976, then she is eligible to practise as an advocate and solicitor under the LPA 1976. The defendant took the stand that the words "advocate of those courts" in G art. 123 of the Federal Constitution must mean a person who has been admitted as an advocate and solicitor and has been enrolled as an advocate and solicitor of the High Court of Malaya, no matter whether he or she is in actual practise or not.

H **[132]** With respect, I could not agree with the submission of the Honourable Attorney General that Dr. Badariah bte Sahamid has met the requirement of being "advocate of those courts" within the meaning of art. 123 of the Federal Constitution and that she need not be in actual practice to qualify for appointment as a

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Judicial Commissioner of the High Court. I am of the view the crucial words under art. 123 of the Federal Constitution that need to be considered are as follows:

> … for the ten years preceding his appointment he has been an advocate of those courts …

[133] I am of the view to be an advocate of those courts, a person has to be in actual or active practise, besides having first been admitted and enrolled under the provision of the LPA 1976 as an advocate and solicitor. It further follows that to enable to practise, an advocate and solicitor has to apply for and be issued with a practising certificate. (See ss. 29(1) and 30(1) of the LPA 1976). Section 35(1) of the LPA 1976 provides that subject to the exceptions in s. 35(2), only advocates and solicitors have the exclusive right to appear and plead in all Courts of Justice in Malaysia. A person who is admitted as an advocate and solicitor but does not possess a valid practicing certificate is termed as "an unauthorized person". (See s. 36(1) of the LPA 1976).

[134] It is my judgment that based on the definition of "advocate" under s. 66 of the Interpretation Act and the relevant provisions of the LPA 1976 as cited above when read together with the words "advocate of those courts" in art. 123 of the Federal Constitution would mean that an "advocate" is someone who has been in practise. In this context I would prefer to adopt the purposive approach of interpretation to be given to the meaning of the words "advocate of those courts" in art. 123 of the Federal Constitution. Our Federal Constitution is a living document and without doing violence to the language used the said art. 123 of the Federal Constitution should receive a fair, liberal and progressive construction so that its true objects must be promoted. (See *Legislation and Interpretation* by Jagadish Swarup at pp. 479-480).

[135] I am of the view the capacity that an advocate must be in active practise for the purposes of art. 123 of the Federal Constitution is further fortified by reference to the words "has been …" and the significance of the ten (10) year period. I take the view that the words "has been" in art. 123 must be in reference to the act that has been done, that is having being a practising advocate at those Courts of Law. The ten (10) year period would mean it is a vital requirement that before Dr.

Badariah bte. Sahamid's appointment as a Judicial Commissioner was made in the present case, she had to show that she has at least ten years experience as a practising advocate. This she had failed to do so. It must also be noted that to construe the words "advocate of those courts" to mean that an advocate need only be admitted and enrolled is to create an absurd situation in that an advocate need not be in active practise. In my view an advocate can only gain experience by being in practise. It is to be noted that under the same art. 123 of the Federal Constitution even a member of the Judicial and Legal Service of the Federation must have the requisite number of years of working experience to be eligible for appointment as a judge or a Judicial Commissioner.

[136] I am in agreement with the submission of Mr. Robert Lazar, learned counsel for the plaintiff that the interpretation favoured by the plaintiff is consistent with the fact that our courts have always considered an advocate to be in active practise because he is not allowed to practise another profession at the same time or be gainfully employed in a capacity other than as an advocate and solicitor. (See the case of *Syed Mubarak Syed Ahmad v. Majlis Peguam Malaysia* [2000] 3 CLJ 659). I also find the interpretation that an "advocate" must be an advocate in active practise is consistent with the dictionary meaning of "advocate". In *Black's Law Dictionary*, 6th edn at p. 55, an advocate is defined as "one who assists, defends, or pleads for another. One who renders legal service and aid and pleads the cause of another. A person learned in the law and duly admitted to practise, who assists his client with advice, and pleads for him in open court." (emphasis added)

[137] Finally, I would like to refer to the case of *All Malayan Estates Staff Union v. Rajasegaran & Ors.* [2006] 4 CLJ 195. In *Rajasegaran*'s case the Federal Court considered the provision of s. 23A(1) of the Industrial Relations Act 1967 ("IRA") which reads as follows:

> **Qualification of President and Chairman of Industrial Court**
>
> 23A. (1) A person is qualified for appointment as President under section 21(1)(a) and as Chairman under section 23(2) if, for the seven years preceding his appointment, he has been an advocate and solicitor within the meaning of the Legal Profession Act 1976 [Act 166] or a member of the judicial and legal service of the Federation or of the legal service of a State or sometimes one and sometimes another.

[138] The Federal Court came to the conclusion that the seven years stipulated in s. 23A(1) of the IRA means that the person must have been in practise for that period of time and must be construed as a reference to an advocate and solicitor who has been in practise under the LPA 1976. I am of the view the reasoning in *Rajasegaran*'s case applies with equal, if not greater force to the present case. The only difference between art. 123 of the Federal Constitution and s. 23A(1) of the IRA is that the number of years 10 in the Federal Constitution and 7 in the IRA, and the phrase "advocate of those courts" in the Federal Constitution reads as "advocate and solicitor within the meaning of the Legal Profession Act 1976" in the IRA. Again, in *Rajasegaran*'s case it shows that an advocate can only gain experience by being in practise. If a narrow construction is adopted to interpret art. 123 of the Federal Constitution in that an advocate need not be in active practise to be eligible for appointment as a judge or as a Judicial Commissioner, and applying the principles enunciated in *Rajasegaran*'s case it would lead to an absurd consequence in that a person who is ineligible to be appointed as Chairman of the Industrial Court (inferior court), could be appointed as a judge or as a Judicial Commissioner of the High Court.

[139] For the reasons already stated my answer to question (i) as referred to by the parties for the determination of this court would be in the affirmative and that the appointment of Dr. Badariah bte. Sahamid as a Judicial Commissioner of the High Court of Malaya with effect from 1 March 2007 is null and void.